

HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION,  
  
Plaintiff,  
  
vs.  
  
MOTOROLA, INC., et al.,  
  
Defendants.  

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MOTOROLA MOBILITY LLC, et al.,  
  
Plaintiffs,  
  
vs.  
  
MICROSOFT CORPORATION,  
  
Defendants.

Case No. C10-1823-JLR

MICROSOFT'S 8/16/13  
MOTION TO SEAL

**NOTED FOR:  
FRIDAY, AUGUST 30, 2013**

**I. RELIEF REQUESTED**

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order entered in this case, Microsoft respectfully seeks leave to file under seal Exhibit 3 to Microsoft's August 16, 2013 letter brief on patent exhaustion, which is an excerpt from Kirk Dailey's January 20, 2012 testimony at the ITC hearing in *In the Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Investigation No. 337-TA-752 ("Exhibit 3").

MICROSOFT'S 8/16/13 MOTION TO SEAL - 1      No. C10-1823

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1 Microsoft seeks to file Exhibit 3 under seal because it has been designated  
 2 “Confidential” by Motorola. Microsoft takes no position with respect to whether Exhibit 3  
 3 should remain under seal.

## 4 **II. LCR 5(g)(3)(A) CERTIFICATION**

5 Shane Cramer (on behalf of Microsoft) and Andrea Pallios Roberts (on behalf of  
 6 Motorola) met and conferred by email on August 16, 2013 in an effort to minimize the amount  
 7 of material to be filed under seal in connection with Microsoft’s letter brief.

## 8 **III. FACTS & AUTHORITY**

### 9 **A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to** 10 **File Confidential Information under Seal.**

11 Pursuant to the Protective Order issued by the Court on July 21, 2011, as amended by  
 12 orders dated October 3, 2012 and July 25, 2013, Microsoft is permitted to file materials  
 13 designated by either party as Confidential Business Information<sup>1</sup> under seal, with such  
 14 documents to remain under seal upon Court approval. Paragraphs 2(a) and 8 of the Protective  
 15 Order govern the filing of documents under seal. Paragraph 2(a) provides:

16 Any information submitted in pre-trial discovery or in a pleading, motion, or  
 17 response to a motion in this action, either voluntarily or pursuant to order, and  
 18 which is asserted by a supplier to contain or constitute Confidential Business  
 19 Information shall be so designated by such supplier in writing...and shall be  
 20 segregated from other information being submitted. Documents shall be clearly  
 21 and prominently marked on their face with the legend: “[SUPPLIER’S NAME]  
 22 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO  
 23 PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of  
 this action, such information, whether submitted in writing or in oral testimony,  
 shall be disclosed only *in camera* before the Court and shall be filed only under  
 seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District  
 Court for the Western District of Washington.

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24 <sup>1</sup> “Confidential Business Information” is defined in the parties’ Protective Order as “information which has not  
 25 been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or  
 apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories,  
 amounts or source of any income, profits, losses, or expenditures.” Protective Order Regarding the Disclosure  
 and Use of Discovery Materials (ECF No. 72), ¶1 (amended by Order dated October 3, 2012 (ECF No. 447)).

Paragraph 8 likewise provides that:

Any Confidential Business Information submitted to the Court in connection with a motion or other proceeding within the purview of this action shall be submitted under seal pursuant to paragraph 2 above.

*Id.*, at ¶ 8.

The Federal Rules of Civil Procedure recognize that courts may permit parties to file “trade secrets or other confidential research, development, or commercial information” under seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly competing needs and interests of the parties affected by discovery,” in crafting the appropriate treatment of documents for which protected treatment is requested. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211-1212 (9<sup>th</sup> Cir. 2002).

A party seeking to seal a judicial record attached to a dispositive motion must articulate “compelling reasons” that outweigh the public policies favoring disclosure. *Kamakana v. City and Cnty. Of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). This presumption may be overcome only on a compelling showing that the public’s right of access is outweighed by the interests of the public and the parties in protecting the court’s files from public review. However, “the public interest in understanding the judicial system would appear to be less where ... the documents in question are irrelevant to the Court’s decision.” *Network Appliance, Inc. v. Sun Microsystems Inc.*, 2010 WL 841274, at \*2 (N.D. Cal. Mar. 10, 2010) (citing *Kamakana*, 447 F.3d at 1179) (documents supporting dispositive motion “[not] bearing on the resolution of the dispute on the merits ... are therefore more akin to the ‘unrelated,’ non-dispositive motion documents the Ninth Circuit contemplated in *Kamakana*”).

“In general, ‘compelling reasons’ ... exist when such ‘court files might have become a vehicle for improper purposes,’ such as the use of records to ... release trade secrets.” *Kamakana*, 447 F.3d at 1179 (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598

(1978)). The Ninth Circuit has adopted the Restatement's definition of "trade secret." *See Ultimate Timing, L.L.C. v. Simms*, 2010 WL 786021, at \*1-2 (W.D. Wash. Mar. 4, 2010) (citing *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972)). Under that standard, a "trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Id.*, 2010 WL 786021, at \*2 (quotations omitted).

**B. Microsoft Seeks to Seal Exhibit 3 at Motorola's Request.**

Motorola has requested that Microsoft file Exhibit 3 under seal. Microsoft has done so, as required by the terms of the protective order.

**IV. CONCLUSION**

A [Proposed] Order Granting Microsoft's 8/16/13 Motion to Seal has been submitted herewith.<sup>2</sup>

DATED this 16th day of August, 2013.

**RESPECTFULLY SUBMITTED,**

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<sup>2</sup> Nothing herein is intended as a waiver of Microsoft's right to contest Motorola's designation of material as Confidential Business Information in accordance with the terms of the protective order. Microsoft expressly reserves the right to do so as the circumstances warrant.

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**CERTIFICATE OF SERVICE**

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On this 16th day of August, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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DATED this 16th day of August, 2013.

/s/ Florine Fujita

FLORINE FUJITA